IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No 245 of 2004
in
COMPANY APPLICATIONNo 42 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHAILENDRA KANH BEHARILAL AGRAWAL
Versus
SURAT DYES

Appearance:
1. COMPANY APPLICATION No. 245 of 2004
MR SUDHIR NANAVATI, SENIOR COUNSEL FOR
NANAVATI & NANAVATI for Petitioner No. 1
MS.SWATI SOPARKAR for Respondent No.1
MRS.P.J.DAVAWALA for Registrar of Companies - Respondent No.2.

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 24/08/2004

CAV. JUDGEMENT

1 This is an application moved by the applicant (original respondent no.1) seeking review of order dated 7/5/2004 made in Company Application No.42 of 2004.

2 The Court by aforesaid order dated 7/5/2004 came to the conclusion that provisions of Section 488(2) of the Companies Act,1956 (hereinafter referred to as 'the Act') have not been complied with and, hence, the consequence provided in sub-section (5) of Section 488 of the Act would follow. Accordingly on account of failure to comply with mandatory requirements of Section 488(2) of the Act the members' voluntary winding up resulted in winding up as creditors' voluntary winding up. The Court also issued further directions.

3 The present applicant carried the matter in appeal being O.J.Appeal No.30 of 2004. The learned Counsel for the applicant herein submitted before the Division Bench of this Court that the finding recorded in the aforesaid order dated 7/5/2004 that the declaration under Section 488(2) of the Act had been submitted with the office of the Registrar of Companies only on 29/7/2003 was erroneous. In support of the said contention the learned Counsel relied upon affidavit dated 1/7/2004 filed by Shri Dhiren R.Dave, Company Secretary and a copy of letter dated 29/6/2003 along with rubber stamp acknowledgment of the office of Registrar of Companies, Gujarat at Ahmedabad. The learend Counsel in reply to the query raised by the Division Bench as to why the same was not produced before the Company Court submitted that the matter was heard on 6th & 7th May,2004 and the learned Advocate appearing on behalf of the applicant had asked for time but the Company Court did not grant any time and proceeded to pass the order on the basis of the record produced by the learned Counsel representing Registrar of Companies. The said statement made by the learned Counsel for the applicant was contested on behalf of respondent no.1 herein (original petitioner) and in the circumstances the appeal was withdrawn on behalf of the applicant with a liberty to appraoch the Company Court by way of Review Application. It is in the aforesaid circumstances that the present application has been moved.

4. Mr.S.I.Nanavati, learned Senior Advocate appering on behalf of the applicant herein referred to affidavit dated 1/7/2004 of Shri Dhiren R.Dave, Company Secretary along with enclosed communication dated 29/6/2003 bearing

rubber stamp of Registrar of Companies, Gujarat, Ahmedabad dated 2/7/2003 and submitted that the Court had, in the circumstances, erroneously held that the declaration required to be made under Section 488 of the Act was filed only on 29/7/2003, whereas in fact the said declaration had been delivered with the office of the Registrar of Companies on 2/7/2003. That accordingly there was sufficient compliance with provision of Section 488(2)(a) of the Act and order dated 7/5/2004 was required to be reviewed. Inviting attention to the language employed by clause (a) of sub-section (2) of Section 488 of the Act Mr.Nanavati submitted that the provision only required that the declaration was required to be 'delivered' before the prescribed period and the legislature had not used the term 'filed'. That both the terms viz. 'delivered' and 'filed' had different connotations and for this attention was invited to the meaning from the book 'Words and Phrases'. It was further submitted that as could be seen from Section 125 of the Act the legislature had used the term 'filed' in the said provision and, hence, different consequences would flow on the basis of different meanings qua the said two terms, and the legislature having used different terms in different provisions the Court should accordingly consider the same in proper perspective. That Section 488(2)(a) of the Act only required delivery of the declaration within the prescribed period and there was no further obligation. Therefore, reliance on Section 611 read with Schedule X of the Act on behalf of the learned Counsel for the Registrar of Companies was unwarranted, because the said provision pertaining to filing fees had no bearing on the operation of provisions of Section 488(2) of the Act. Referring to the affidavit-in-reply filed on behalf of the Registrar of Companies Mr.Nanavati submitted that the said affidavit-in-reply was silent qua the contention raised on behalf of the applicant that the declaration and the accompanying documents had been furnished on 2/7/2003, and on the other hand the said affidavit-in-reply mentions that the declaration had been received only on 4/7/2003. That there was apparent contradiction in as much as when the matter was originally heard it was submitted that the declaration had been received only on 29/7/2003 while for the first time in the present proceedings the affidavit-in-reply on behalf of the Registrar of Companies stated that the same had been received on 4/7/2003. Lastly it was submitted that the applicant had engaged a professional practioner in the field of Company Law, handed over the declaration and relevant documents to him well within time and, hence, no fault could be found with the applicant and the applicant

should not be visited with any consequences, especially when the professional has stated on affidavit that the documents had been delivered with the Registrar of Companies on 2/7/2003. It was therefore submitted that paragraph No.10.1 of order dated 7/5/2004 was required to be reviewed. It was urged that considering the dispute between the parties as to the date of actual delivery/receipt of the declaration in the office of the Registrar of Companies the Court may call for the original file from the office of the Registrar of Companies and examine the record so as to satisfy itself as to the varacity of the averment made on behalf of the applicant in the affidavit accomanying Judge's Summons as well as supporting affidavit of the professional Company Secretary Shri Dhiren R.Dave.

5 Mrs.P.J.Davawala, learned Additional Central Government Standing Counsel appearing on behalf of the Registrar of Companies submitted that there was no dispute as to the date 29/7/20003 because that is the date on which the applicant had paid the filing fees. That in the affidvit-in-reply it was rightly submitted that the document in question had been received only on 4/7/2003 and the said statement had been made on the basis of the record of the office of the Registrar of Companies. It was further submitted that on scrutiny of the said document the Registrar of Companies had written a letter dated 10/7/2003 calling upon the apploicant to submit various details mentioned in the letter in light of the fact that the document delivered on 4/7/2003 was defective. It was submitted that the grievance of the applicant that the affidavit-in-reply did not mention anything qua communication dated 29/6/2003 stated to have been delivered in the office of the Registrar of Companies on 2/7/2003 was without any basis, because no such document had in fact been received in the office of respondent No.2. Inviting attention to Regulation 18 of the Companies Regulations 1956 (hereinafter referred to as 'the Regulations'), it was submitted that in absence of payment of fees payable under Section 611 read with Schedule X of the Act no document could be registered, recorded or taken on file and hence, even on the assumption that the document had been delivered on 2/7/2003 the said document could not be said to be delivered for registration. That provision of Section 488(2)(a) of the Act specifically provided that " declaration is delivered to the Registrar for registration before that date". Thus, it was submitted that it would make no difference whether the document was delivered on 2/7/2003 or 4/7/2003 as the said document was defective and was not accompanied by the prescribed

fees. Therefore, there being no error in the order of the Court the application for review was not maintainable.

6. Mrs.Swati Soparkar, learned Advocate appearing on behalf of respondent No.1 (original petitioner) invited attention to affidavit dated 1/7/2003 made by Shri Dhiren R.Dave, Company Secretary to point out that though the said affidavit is dated 1/7/2004 there is no mention of communications dated 11/6/2004 and 26/6/2004 stated to have been addressed by the said Company Secretary to the Registrar of Companies, copies whereof are annexed to the affidavit-in-rejoinder. She further referred to statement as on 31/5/2003 showing assets and liabilities accompanying the declaration of solvency and submitted that if the Court was inclined to accept the request of the applicant to peruse the original record of the Registrar of Companies, the rubber stamp appearing on the said statement (appearing at page no.64 of the main petition) be verified as the date in the rubber stamp was not clear in the copy filed. She further referred to the affidavit dated 5/7/2004accompanying Judge's Summons as well as Additional Affidavit dated 6/5/2004 filed by the applicant in the main petition to point out certain contrary statements and submitted that the entire case of the applicant which was based on the averment that the applicant was not aware that the Company Secretary had delivered the documents with the Registrar of Companies on 2/7/2003 was not believable and appeared to be false. She invited attention to provisions of Order 47 Rule 1 of the Code of Civil Procedure (hereinafter referred to as 'CPC') and submitted that the applicant had failed to show compliance with the conditions prescribed for the purpose of applying for review of the order on the basis of discovery of new and important evidence. That in fact the case was a case of negligence and not a case of due diligence and the applicant had failed to show that he had no knowledge or could not produce communication dated 29/6/2003 addressed by Shri Dhiren R.Dave to the Registrar of Companies when the petition was originally heard. In the circumstances, relying upon the decision in case of Shanmugam Servai Vs. P.Periyakaruppan Servai, AIR 1996 (Madras) 411 it was submitted that a mere bare assertion in the affidavit was no ground to seek legal remedy provided under Order 47 Rule 1 of Code of Civil Procedure.

7 Mr.S.I.Nanavati, learned Senior Advocate in rejoinder referred and relied upon the decision of Madras High Court in case of V.Mahadeva Gurukkal Vs. Commissioner for the Board of Hindu Religious Endowments,

Madras, AIR 1956 (Madras) 522 to submit that for granting a review on the ground of discovery of new evidence, the Court is not called upon to see whether the evidence, if believed, would be conclusive but has simply to be satisfied that the new evidence is prima facie, important and fit to be considered. He therefore submitted that the decision cited on behalf of respondent no.1 which was rendered by a learned Single Judge cannot assist the case of the respondent and the Court should while deciding the matter only consider whether the new evidence was prima facie important and fit to be considered. Referring to anomaly as to mode of delivery of the document between the additional affidavit filed by the applicant in the main petition and the affidavit of Shri Dhiren R.Dave it was submitted that the said anomaly had occurred due to unforseen circumstance in as much as Shri Dhiren R.Dave was out of station when the additional affidavit in the main petition had been tendered. Referring to provisions of Order 47 Rule 1 of the Code of Civil Procedure it was submitted that the conditions stipulated therein were satisfied in light of the affidavit dated 1/7/2004 of Consultant Shri Dave. He reiterated his submission that the affidavit-in-reply filed on behalf of respondent No.2 was silent as to the communication dated 29/6/2003 which showed rubber stamp bearing 2/7/2003 as the date of receipt and the affidavit merely stated that the document had been received on 4/7/2003; that therefore the statement made by the learned Advocate for the Registrar of Companies that no document had been received on 2/7/2003 went beyond the affidavit. Lastly it was submitted that even if the Registrar of Companies had indicated that the document had not been received within the stipualted period of limitation under Section 488(2)(a) of the Act, the applicant would have resorted to provision of Section 637(b) of the Act and applied to the Central Government for condonation of delay.

8 In the main petition on 19/2/2004 notice was issued after hearing the petitioner and the said notice was made returnable on 18/3/2004. On 18/3/2004 the matter was adjourned to 26/3/2004. On the said date i.e. 26/3/2004 the following order came to be made :

"Despite the notice having been issued as far back as on 19/2/2004 the Board shows endorsement in relation to respondent no.1 and respondent nos. 3 to 8 that notice not received back. In the circumstances, the learned Advocate for the applicant seeks issuance of fresh notice and permission for effecting direct service. Fresh notice to unserved respondent nos.1,3,4,5 & 6 as

well as respondent no.2 returnable on 9.4.2004. Direct service permitted."

9. On 9/4/2004 the matter was adjourned to 30/4/2004. On 30/4/2004 the learned Advocate tendered affidavit-in-reply dated 26/4/2004 and sought time. Accordingly the matter was adjourned to 5/5/2004. The matter was thereafter taken up for hearing and as during course of hearing a dispute arose as to when the declaration made under Section 488(2) of the Act was made and filed the applicant herein was directed to file additional affdiavit which came to be filed on 6/5/2004. Thereafter, the matter was heard at length, both on 6th and 7th May,2004 and the judgment was delivered on 7/5/2004. It has become necessary to narrate the aforesaid sequence of events only in light of the submission made on behalf of the applicant herein before the Division Bench in O.J.Appeal to submit that no time was granted by the Court and this prevented the applicant herein from placing communication dated 29/6/2003 stated to have been served with the office of the Registrar of Companies on 2/7/2003 on record.

10. Be that as it may. The dispute between the parties centers round the date of delivery of the declaration : Whether the same was delivered within the period provided under Section 488(2)(a) of the Act, or whether the same was delivered beyond the prescribed date. The declaration of solvency was admittedly made on 5/6/2003 and, hence, the same had to be delivered before the date of resolution which is dated 3/7/2003. If the applicant is able to establish that the said declaration was delivered before 3/7/2003 the applicant would succeed from consequence provided in sub-section (5) of Section 488 of the Act; if the applicant fails to establish delivery of the declaration before 3/7/2003 the winding up proceedings would become the creditors' voluntary winding up and would not remain a members' voluntary winding up.

11. The applicant has for this purpose relied upon affidavit dated 1/7/2004 made by Shri Dhiren R.Dave, Company Secretary who is practising as Company Secretary. In the said affidavit Shri Dave states in paragraph No.2 that the applicant had handed over a copy of declaration of solvency with necessary accompaniments for forwarding the same to the Registrar of Companies. In paragraph No.3 it is stated that he had an arrangement to submit various papers of his clients with office of the Registrar of Companies and accordingly he forwarded the

papers together with his forwarding letter dated 29/6/2003. It is further submitted in the said paragraph that the said papers along with the forwarding letter were delivered in the office of the Registrar of Companies, Ahmedabad on 2/7/2003 and on the duplicate copy of the said letter acknowledgment from that office was obtained by affixation of rubber stamp of the office of Registrar of Companies. A photocopy of the receipted letter has been annexed as Annexure "A" to the affidavit of Shri Dave. On the basis of the aforesaid affidavit of Shri Dave the applicant in his affidavit dated 5/7/2004 accompanying the Judge's Summons states that the requirement of Section 488(2) was thus properly complied with. In the circumstances, according to the applicant order dated 7/5/2004 was required to be reviewed.

12. Order 47 Rule 1 and Rule 4 of the Code of Civil Procedure read as under :

"1. Application for review of judgment.-(1) Any person considering himself aggrieved -

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order."

xxx xxx xxx xxx

"4. Application where rejected.- (1) Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

(2) Application where granted.- Where the Court is of opinion that the application for review should be granted, it shall grant the same :

Provided that-

(a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for; and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation."

13. Rule 1 requires that a person may apply for review of judgment to the Court on the ground that there was discovery of new and important matter or evidence which, after exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order was made. The case of the applicant is based only on this ground and the other grounds for review viz. on account of mistake or error apparent on the face of the record, or for any other sufficient reason have not been pressed into service. Therefore, the case of the applicant shall have to be tested : as to whether firstly, there is discovery of new and important evidence; secondly, whether there was exercise of due diligence and yet the evidence was not within his knowledge; and thirdly, despite exercise of due diligence the evidence could not be produced when the order was made.

14. The position in law is well settled that an application on the ground of discovery of new and important evidence or matter must be treated with great caution and as required by Rule 4(2)(b) of the Code of Civil Procedure the Court must be satisfied with the materials placed before it. In accordance with the requirement of the provision the applicant must prove the existence of the facts averred in the application. Before a Review Application can be allowed on the ground of discovery of new evidence the applicant has to establish that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge. Thus, where the applicant seeks review of an order on this ground but it is found that the applicant

had not acted with due diligence the Court is not entitled to admit the said evidence on the ground of sufficient cause. The three pre-requisite conditions under Rule 1 of Order 47 of the Code of Civil Procedure are independent of each other and unless and until a specific pleading is made the Court cannot undertake an exercise so as to hold that even if the condition on which reliance is placed by the applicant is not satisfied the order be reviewed in relation to any other ground : as the same would leave the other party without any opportunity to meet with such a new case.

15. It is equally well established that the discovery of new evidence is by itself not sufficient to entitle the applicant to a review of the order. The provision contemplates review on the ground or grounds which would alter or cancel the judgment. Thus, if the judgment is based on two grounds and the applicant applies for review on the ground of discovery of new evidence only on one of the questions decided by the judgment, it would be a good ground for rejecting the application. That even if the Court holds on admission of the new evidence in favour of the applicant, it would not lead to modification or setting aside of the judgment, as the other ground on which the matter was decided by the Court remains uncontroverted.

16. As can be seen from Rule 4(2)(b) of Order 47 of the Code of Civil Procedure the application for review cannot be granted on the ground of discovery of new evidence in absence of the applicant strictly proving the averment as regards the new evidence not being within his knowledge or not being able to produce the same when the order was made. In other words, the concept of 'discovery' has to be borne in mind. Ordinary meaning of the word discovery : "means revealing, disclosure, finding out, making known etc". Thus, the onus on the applicant seeking review is to first of all establish by cogent evidence as to how and in what manner and at what point of time did the applicant discover the new evidence i.e. find out the new evidence or come to know about the new evidence.

17. Therefore, on conjoint reading of Rule 1 and Rule 4(2)(b) of Order 47 of the Code of Civil Procedure it becomes apparent that before the applicant can seek review on the ground of discovery of new and important evidence the applicant has to establish (1) due diligence, and (2) discovery. The phrase 'due diligence' does not mean only absence of negligence; but the applicant is required to show that he had taken all

necessary steps to ascertain that all the necessary evidences were available and placed on record and despite such an exercise the new evidence was either not available to him or was not within his knowledge when the order came to be made. Hence, the present application for review will have to be tested on application of the aforesaid principles : Whether it was possible for the applicant to trace the letter purported to have been delivered to the office of the Registrar of Companies on 2/7/2003 and further as to whether the applicant was or was not in possession of the said document i.e. whether the said document was within the custody of the applicant or not, or whether the applicant could have obtained the document; because, a mere bare assertion in the affidavit to the aforesaid effect would not be a ground to seek legal redress by invoking Order 47 Rule 1 of the Code of Civil Procedure.

18. It is an admitted position, from the facts which have come on record, that there is nothing to show as to how, in what manner and at what point of time the applicant discovered new and important evidence viz. communication dated 29/6/2003 from the Company Secretary to the Registrar of Companies stated to have been delivered with the office of the Registrar of Companies on 2/7/2003. The provision specifically requires that the person applying for review has to show that after exercise of due diligence the new and important evidence was not within his knowledge, when the order was made or after the exercise of due diligence the new and important evidence could not be produced by him when the order was made. Therefore, the applicant has to first of all establish that there was exercise of due diligence and yet the evidence which is new and important did not come to his knowledge, or that despite exercise of due diligence the new and important evidence could not be produced by the applicant at the time when the order was made. In the present case it is not possible to accept that the applicant has fulfilled the pre-requisite condition : because the applicant has failed to show that he had exercised due diligence and after that, the evidence in question was not within his knowledge, or that it could not be produced when the order was made despite exercise of due diligence.

19. The additional affidavit dated 6/5/2004 by the applicant tendered in the main petition does not state: (i) that the comany had engaged a consultant Shri Dhiren R.Dave; (ii) that Shri Dave was not available either on 5/5/2004 or 6/5/2004 so as to disable the applicant from placing correct and complete facts on record. Shri Dave

comes into picture only when the appeal is filed. There is no reference to Shri Dave in the main proceedings despite the applicant having filed two affidavits :(i) dated 26/4/2004, and (ii) additional affidavit dated 6/5/2004.

20. Even otherwise, the facts go to show that the said piece of evidence viz. communication dated 29/6/2003, even if true and correct, could not have been lost sight of by the applicant when the main petition was heard and the order was made. In the affidavit dated 1/7/2004 Shri Dhiren R.Dave, Company Secretary states :

> "As I was acting as Consultant, the said receipt along with other papers was retained by me in consultation with Shri Shailendra Kanh Beharilal Agrawal. I further say that, as the said receipt was not delivered to Shri Shailendra K.Agrawal, he might not be aware about the mode of delivery of documents with ROC office."
> (emphasis supplied)

As against that the applicant in paragraph No.7 of his affidavit dated 5/7/2004 staets :

> "7. I respectfully submit that the said letter produced by Mr.Dave was not within my knowledge and I had presumed that the papers were sent by post in ordinary course by Mr.Dave and hence I stated so in my affidavit filed in Civil Application No. 42 of 2004. I regret for furnishing incorrect information to this Honourable Court and apologized for the same. I, therefore, earnestly submit to this Honourable Court that the said Affidavit may please be considered by this Honourable Court sympathetically and favourably and the Honourable Court would be pleased to review the Order dated 7th May 2004 favourably".

21. Therefore, on 1/7/2004 Shri Dave deposes by affidavit that the said receipt along with other papers was retained by him "in consultation" with Shri Shailendra Kanh Beharilal Agrawal. In the immediately following sentence Shri Dhiren Dave tries to salvage the situation by stating that as the receipt was not delivered to Shri Agrawal he "might not" be aware about the mode of delivery of document with ROC office. While on the other hand, the applicant in his affidavit dated

5/7/2004 states that the said leter produced by Mr.Dave was not within his knowledge and he had presumed that the papers were sent by post in ordinary course by Mr.Dave.

22. If Shri Dave is right the said receipt had been retained by him in consultation with the applicant. Then there is no question of the applicant stating that the said letter was not within his knowledge. The applicant then could not have presumed that papers were sent by post in ordinary course. Similarly, if the receipt in question had been retained by Shri Dave in consultation with the applicant and the said receipt was not handed over to Mr. Agrawal there is no necessity for Mr.Dave to state that Shri Agrawal might not be aware about the mode of delivery of documents despite having stated in the immediately preceding sentence that the receipt along with other papers was retained by him in consultation with Shri Agrawal. The conclusion therefore is, either the applicant is not stating truth, or Shri Dave is trying to prevaricate so as to suit the needs of the applicant.

23. There is one more aspect of the matter. In order dated 7/5/2004 made in Company Application No.42 of 2004 in paragraphs Nos. 10.3 & 10.4 this is what is stated :

"10.3. Similarly, sub-clause (b) of sub-section (2) of Section 488 of the Act is also a condtiion precedent which goes to show that such a declaration has to be accompanied by a copy of the report of the auditors of the Company and such report has to embody a statement of the company's assets and liabilities as at the prescribed date. The emphasised portion of clause (b) shows that the declaration referred to in clause (a) has to be accompanied by the report of the auditors of the Company, and such report has also to embody a statement of the assets and liabilities. Thus, the requirement of the provision is a report containing Profit & Loss A/c.,a Balance Sheet, and one which also embodies a statement of debts and liabilities. In absence of such a report of the auditors only a statement of debts and liabilities does not show necessary compliance.

10.4. On going through the facts of the case as

> the record of the Registrar of Companies reveals, the declaration is accompanied only by a statement, which is dated 05-06-2003, showing assets at estimated realisable values and liabilities expected to rank as on 31-05-2003; the said statement is signed by the two directors who have made the declaration. There is no report of the auditors of the Company as required under Clause (b) of sub-section (2) of Section 488 of the Act. Therefore, even this condition which is also a necessary condition is not fulfilled. Mr.Gupta for respondent No.1 raised a contention during course of hearing to the effect that even if such a report of the auditors has not been submitted, at the highest it is a technical lapse once the statement of assets and liabilities was presented before the Registrar of Companies and it should not be held against respondent No.1. Considering the statutory language it is not possible to treat this as a technical lapse. The directors are interested persons - auditors are not, at least not expected to be. The Company has failed to comply with requirements of Section 488(2) of the Act".

24. In the entire review petition there is not a single whisper as to compliance with Section 488(2)(b) of the Act. The entire review application is based on the fact that Shri Dave had delivered the declaration of solvency along with accompanying documents on 2/7/2003. Affidavit-in-reply dated 3/8/2004 filed by Shri U.S.Patole, Assistant Registar of Companies, Gujarat categorically states in paragraph No.5 that the declaration of solvency made as on 5.6.2003 was received in his office on 4/7/2003 without any registration fee as required under Section 611 read with Schedule X of the Act. The registration fee was received only on 29/7/2003. Thereafter, in the said affidavit in paragraph No.6 it is stated that the applicant vide his letter dated 28/7/2003 received in the office of the Registrar on 29/7/2003 paid the filing fees of Rs.500/by Demand Draft accompanying the said letter.

25. In this connection, it is necessary to note that on 10/7/2003 the Registrar of Companies wrote a letter

calling upon the applicant to comply with various requirements stated in the letter but what is more material is requirement No.8 which reads as under :

"8. Furnished a certified copy of latest balance sheet along with Directors Report, Auditors Report and statement of the company's assets and liabilities as on the date of the balance sheet."

Thereafter, on the reverse side of the said letter the following requirement is hand written as an additional requisition :

"You are also requested to remit Rs.500/- as filing fees of aforesaid Declaration of Solvency u/s.488 of the Cos Act 1956 filed with this office on 4-7-2003 immediately. Otherwise the said D/S treated as not filed which may please be noted".

26. The applicant replies vide letter dated 28/7/2003 and vide paragraph No.5 states as udner :

"5. Certified copy of the Balance Sheet along with Director's Report, Auditor's Report and Statement of Assets and Liabilities are already submitted with your office on 26/05/2003 vide Receipt No.468485.

However copy of the same is once again attached herewith for your ready reference".

27. It is stated that certified copy of balance sheet along with Director's report and statement of assets and liabilities are already submitted on 26/5/2003 vide receipt No.468485. The declaration of solvency is dated 5/6/2003; any such documents filed on 26/5/2003 cannot be in compliance with statutory requirement under Section 488(2)(b) of the Act. Assuming that this statement is correct then it only goes to show that the aforesaid documents which are to accompany the declaration of solvency as provided in Section 488(2)(b) of the Act were not delivered with the declaration of solvency within prescribed period of limitation. This statement in letter dated 28/7/2003 also disproves the statement made in so called communication dated 29/6/2003 addressed by Shri Dhiren R.Dave, Company Secretary to the Registrar of Companies wherein it is stated that " I deliver herewith

following documents for registration". Thereafter, it is stated that the declaration of solvency along with Director's report, Auditor's report, Profit and Loss account for the year ended on 31/3/2003 and balance sheet as on that date and statement of assets and liabilities as on 31/5/2003 and other related documents are delivered for registration. If these documents had been delivered on 26/5/2003 as stated in letter dated 28/7/2003 they could not have accompanied declaration of solvency stated to have been delivered along with letter dated 29/6/2003 on 2/7/2003. It is not even the case of the applicant. If these documents had in fact been delivered along with communication of 29/6/2003 the Registrar of Companies was not required to specifically call for said documents vide his communication dated 10/7/2003. Therefore, the finding recorded in paragraph Nos. 10.3 and 10.4 of order dated 7/5/2004 regarding non compliance of provisions of Section 488(2)(b) of the Act remains, without being disturbed in any manner whatsoever.

28. Regulation Nos. 17 & 18 of the Regulations read as under :

"17.(1) The Registrar shall examine, or cause to be examined, every document received in his office which is required or authorised by or under the Act to be registered, recorded or filed by or with the Registrar.

(2) If any such document is found to be defective or incomplete in any respect, the Registrar shall give notice in writing to the company to rectify the defect or complete the document or to file a revised document complete in all respects, within 15 days from the date of such notice.

(3) In case of failure on the part of the company to rectify the defect or to complete the document within 15 days after giving notice to the company, the document shall be registered, recorded or filed as the case may be, by the Registrar and the company shall be informed accordingly.

18. No document required or authorised by or under the Act to be registered, recorded or filed by or with the Registrar shall

be registered, recorded or taken on file until the fee, if any, payable in respect thereof under Schedule X to the Act and any additional fee imposed by the Registrar under Section 611(2) are paid".

29. Regulation 17 requires scrutiny of every document received in the office of the Registrar for the purpose of registration, record or filing and in case of a document found to be defective or incomplete the Registrar is required to call upon the Company to rectify the defect or complete the document or file revised document within 15 days from the date of such notice. In compliance with the aforesaid regulation the Registrar has addressed the aforesaid communication dated 10/7/2003.

30. Regulation 18 provides that no document required under the Act to be registered, recorded or filed by or with the Registrar shall be registered, recorded or taken on file until the fee, if any, payable in respect thereof under Schedule X to the Act is paid. As can be seen from aforesaid communication dated 10/7/2003 addressed by the Registrar to the Company the declaration of solvency was not accompanied by the requisite filing fees. Section 488(2)(a) of the Act specifically provides that the declaration of solvency is required to be delivered to the Registrar for registration before the prescribed date. What is material is that the delivery of the document is for the purpose of registration and unless and until necessary fee accompanies the delivery of the document the document cannot be registered. In light of the aforesaid statutory requirement the contention raised on behalf of the applicant as to the difference in connotation of the terms "delivered" and "filed" loses its significance. Once there is a statutory prescription that for the purpose of registration the document has to be accompanied by the prescribed fee compliance is a pre requisite for registration : in absence of the payment of the prescribed fee there is statutory defect and only on removal of the same can the document be taken on file. In the present case there is no dispute that the filing fees came to be tendered only on 29/7/2003. Therefore, the document in question i.e. the declaration of solvency came to be delivered only on 29/7/2003.

31. At the request of the applicant the original record of the Registrar of Companies has been placed before the Court by the learned Advocate for respondent No.2. The said file shows that the Company in liquidation has been assigned Company No.8663 and File

No.8663/LIQN. Having gone through the said file the following facts emerged :

[a] Declaration of solvency bears a note at the botttom : 'Filing fees of Rs.500/not paid'. Thereafter there is an initial and beneath the initial the date 9.7.2003 appears.

[b] The said document shows receipt No.475533 and the date is 29/7/2003.

[c] Declaration of solvency is accompanied by statement as at 31/5/2003 showing assets at estimated realisable value and liabilities expected to rank and the said document bears rubber stamp showing inward date as 4/7/2003 and inward number 17034.

[d] Both the documents viz. declaration of solvency and the statement accompanying it bear round rubber seal of Executive Magistrate, Surat, District Surat and on the reverse side of the declaration of solvency one-half of the round seal appears on the statement denoting that both the documents were presented before the Executive Magistrate simultaneously.

[e] The statement of assets and liabilities shows signatures of two directors of the company in liquidation at the bottom and next to the signature rubber stamp showing 'Before me' S.N.Patel, Executive Magistrate, District Surat is seen along with signature of the said Executive Magistrate.

[f] A set of xerox copies of the director's report, auditors report etc. is available but the same do not bear any seal of the Executive Magistrate as in the other two documents mentioned hereinbefore.

[g] The file also shows computerised print out showing "INFORMATION ON DOCUMENTS DIARISED BY THE COMPANY" wherein the following columns appear: Receipt Date, Diary Number, Type of Document and Document Date. Before the various entries commence the statement shows titled as 04-8663 ARYA SILK MILLS PVT.LIMITED. The said statement reads from the latest period and goes back upto 8/6/1996. It is pertinent to note that in the said statement on 4/6/2003 inward number is 11640 and type of document is 'INSPECTION'. Thereafter the next entry that appears is 4/7/2003 bearing inward number 17034 and shows type of document as 'LETTERS'. The next entry is of 18/7/2003 bearing inward number 19671 being 'FORM 23 DATED 3/7/2003'.

[h] On 18/7/2003 there are two more entries bearing inward number 19672 'FORM 152 DATED 3/7/2003' and 19673 being 'LIQUIDATION DATED 3/7/2003'.

[i] Thereafter on 29/7/2003 entry bearing inward number 21797 showing 'FORM 4A DATED 5/6/2003' appears which is the inward number on the declaration of solvency.

[j] Therefore, between 4/6/2003 and 4/7/2003 no document has been received as can be seen from the computerised statement; and the declaration of solvency has been taken on record only on 29/7/2003 when the filing fees were paid.

[k] The correspondence exchanged between the Registrar of Companies and the applicant viz. dated 10/7/2003 and 28/7/2003 have already been referred to but the file reveals subsequent correspondence. On 8/10/2003 Registrar of Companies called upon the applicant to send copy of notice published in Government Gazette as well as relevant newspapers' cuttings along with "copy of balance sheet which was not

sent to this office so as to enable this office to take liquidation documents filed with this office on record". The said letter is followed by letter dated 2/11/2003 which is a reminder to letter dated 8/10/2003 calling upon the applicant to furnish necessary details requisitioned in letter dated 8/10/2003. Reply to the aforesaid letter is dated 19/1/2004 and the same has been received in the office of the Registrar of Companies on 20/1/2004 and in the said letter it is stated by the applicant that in reply to the captioned letter the following papers are submitted, and at item No.3 it is stated "copy of the balance sheet as on 31/3/2003".

32. Therefore, it is more than abundantly clear that the balance sheet was not filed with the declaration of solvency and the finding recorded in the judgment and order dated 7/5/2004 to the effect that the declaration of solvency was not accompanied by the necessary documents remain unshaken. The finding therefore that provisions of Section 488(2) of the Act remained uncomplied with is not shown to be erroneous in any manner.

33. On going through each document on the file it is apparent that communication dated 29/6/2003 addressed by Shri Dhiren Dave, Company Secretary stated to have been delivered in the office of Registrar of Companies on 2/7/2003 does not find place on record. Subsequent letters dated 11/6/2004 and 28/6/2004 addressed by Shri Dave are available on record.

34 To summarise :

[a] An application for review on the ground of discovery of new evidence cannot be granted unless the applicant discharges the onus by strict proof;

[b] Such proof has to be in relation to :

[i] exercise of due diligence and after that;

[ii] absence of knowledge as regards

new and important evidence or;

[iii] production of such evidence when the judgment came to be pronounced;

[c] The applicant has failed to show 'discovery' of new and important evidence, much less any evidence;

[d] The applicant has failed to show exercise of due diligence;

[e] The applicant has failed to show absence of knowledge about so called letter dated 29/6/2003;

[f] The file of the ROC reveals there is no letter dated 29/6/2003 on record and the applicant has thus failed to establish any such delivery;

[g] The conditions for exercise of review jurisdiction under Order 47 Rule 1 read with Rule 4(2)(b) are not fulfilled.

Hence the present application for review of judgment and order dated 7/5/2004 in Company Application No.42 of 2004 cannot be granted.

35. In the circumstances, it is apparent that the appellant has failed to make out any case on facts. To the contrary the applicant has tried to build a case on the basis of non existent document with the help of one Shri Dhiren Dave, Company Secretary and both of them have made factual averments on affidavit which are found to be prima facie untrue. In the circumstances, both the applicant and Shri Dave are required to be prosecuted under Section 195 of the Code of Criminal Procedure,1973 for offences relating to document given in evidence; and are also required to be proceeded against under the provisions of the Contempt of Courts Act,1971. At the same time the Council of the Institute of Company Secretaries of India constituted under Company Secretaries Act,1980 is required to be directed to initiate appropriate action under Section 21 of the Company Secretaries Act,1980 against Shri Dave for misconduct.

36. However, before initiating any action in this

regard, the Registrar of the High Court is directed to undertake an inquiry in this direction either himself or through an officer authorised by him in this behalf and place the report of such inquiry before this Court. For the purpose of inquiry it shall be open to the Registrar or the officer authorised by him to examine the original record of the office of the Registrar of Companies. The Registrar shall report the result of the inquiry within a period of four weeks from today.

37. In the result, the application seeking review of judgment and order dated 7/5/2004 is rejected. The applicant shall pay costs of Rs.2,500/- each to Respondent No.1 and Respondent No.2.

Sd/-
(D.A.Mehta, J)

At this stage, Mr.Bhatt on behalf of the applicant prays to stay the operation of this judgment and order. In light of the facts which have come on record the prayer stands rejected.

(D.A.Mehta, J)

m.m.bhatt